Pedro's Inc., d/b/a Pedro's Restaurant *and* Hotel and Restaurant Employees and Bartenders Union, Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 32-CA-1014 and 32-RC-276

May 20, 1982

SUPPLEMENTAL DECISION AND ORDER AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On November 23, 1979, the National Labor Relations Board issued its Decision and Order[1] in this proceeding in which it adopted Administrative Law Judge Earldean V. S. Robbins' findings that Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and sympathies, by threatening an employee with discharge because of his union activities, by soliciting grievances from employees in order to discourage their support for the Union, by promising and granting benefits and improved working conditions to employees in order to induce them to reject the Union as their collective-bargaining representative, and by promulgating a no-solicitation/no-distribution rule to discourage employees from engaging in union activities. The Board further found that the Union had attained majority status; that the likelihood of erasing the effect of Respondent's unfair labor practices and conducting a fair election was slight; that Respondent's refusal to bargain, in the context of the unfair labor practices found, violated Section 8(a)(5); and that a bargaining order should therefore issue.

Thereafter, on April 13, 1981, the United States Court of Appeals for the District of Columbia enforced the Board's Order with respect to the 8(a)(1) violations, except for those involving the announcement and implementation of a health insurance plan.[2] Concluding that "the Board appeared to rely heavily on this [grant of benefit] violation to sustain the issuance of a bargaining order," the court remanded the case to the Board for a determination of whether the remaining unfair labor practices were sufficiently serious and pervasive to support the issuance of a bargaining order. The court also directed that the Board, in determining the propriety of a bargaining order, consider conditions in the bargaining unit at the time it renders its decision on remand.

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position concerning the issues raised by the remand. Subsequently, the Charging Party and Respondent filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole, including the statements of position, in light of the court's decision, which the Board has decided to accept as the law of the case, and makes the following findings:

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*,[3] the Supreme Court set forth certain standards relating to bargaining orders as follows: (1) A bargaining order may be granted where an employer's unfair labor practices are "outrageous" and "pervasive"; (2) a bargaining order may be granted "in less extraordinary cases marked by less pervasive unfair labor practices which nonetheless still have a tendency to undermine majority strength"; and (3) a bargaining order is not appropriate in cases involving minor or less extensive unfair labor practices "which, because of their minimal impact on the election machinery, will not sustain a bargaining order."

In the instant case, the court of appeals observed that the Board relied heavily on the implementation of the health insurance plan in concluding that a bargaining order was warranted. Thus, the Board noted that this conduct "had effects which cannot be expunged through traditional Board remedies" and "exert[ed] a strong and lingering coercive effect on the employees' freedom of choice." 246 NLRB at 582. However, as stated above, the court concluded, contrary to the Board, that Respondent's action in this regard was lawful.

It is our opinion that the remaining 8(a)(1) violations in this case bring it within the third of the aforementioned *Gissel* categories and do not warrant a bargaining order. The unlawful conduct is not so coercive that it renders slight the possibility of holding a fair and reliable election after the application of traditional remedies. The interrogations involved approximately a dozen employees out of a unit of 110 employees. In connection with the meetings at which management solicited grievances and promised remedies, we note that no economic benefits were promised. The only benefit actually granted was a posting of promotional opportunities pursuant to an admittedly existing policy of promoting from within. While there was one threat of discharge for union activity made to one employee, it was not a direct threat but rather was implied

[1] 246 NLRB 567.
[2] 652 F.2d 1005 (D.C. Cir.)
[3] 395 U.S. 575 (1969).

and veiled. We believe that all of the aforementioned violations and Respondent's unlawful promulgation of a no-solicitation rule can adequately be remedied by means of the court-enforced cease-and-desist order.

Accordingly, in the particular circumstances of this case, we conclude that a bargaining order is not required or appropriate to remedy the violations affirmed by the court of appeals. Rather, we shall direct a second election. Thus, in our original Decision and Order we sustained, *inter alia*, the Union's Objections 4 and 8, finding that Respondent's unlawful interrogation of employees during the critical period interfered with employee free choice. The court affirmed these 8(a)(1) findings.[4] Therefore, we shall reopen the representation proceeding and remand the case for the holding of a new election.

[4] However, in light of the court's finding that the implementation of the health insurance plan was lawful, we hereby overrule Objection 2.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby modifies the Order heretofore entered in this proceeding on November 23, 1979 (246 NLRB 567), by deleting paragraphs 1(a) and 2(a) and the fourth and last paragraphs of the Notice to Employees.

IT IS FURTHER ORDERED that Case 32-RC-276 be, and it hereby is, reopened; that the election held on April 21, 1978, be, and it hereby is, set aside; and that Case 32-RC-276 be, and it hereby is, severed and remanded to the Regional Director for Region 32 for the purpose of conducting a new election in accordance with the direction set forth below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]